EQUITABLE CONVERSION IN WISCONSIN

W. LAWRENCE CHURCH*

I. INTRODUCTION

It is the nature of the process of the common law that attempts be made to bring logical order into the seeming chaos of legal rules derived from great numbers of individual, unconnected judicial opinions. To some extent, such efforts are indispensable for an understanding of the law, for without them the law would surely be too vast for mortal comprehension. Yet there is an automatic cost associated with such efforts. The soul of a legal system, particularly a system based primarily on case decisions, is its flexibility, its capacity for adaptation to meet subtle distinctions in individual cases—to grow and to shift with new directions in social mood and public policy. A necessary concomitant of any attempt to impose logical consistency and conceptual simplicity on law is a reduction in this vital ingredient of immediacy.

All lawyers are familiar with the results of the continuing struggle for legal order and certainty, for "logic" on the one hand, and for policy recognition and flexibility on the other. Legal rules are propounded to apply on a broad scale to many cases; but as time passes, as the policies which originally supported a rule change and application of the rule becomes extended beyond its original intended limits, lawmakers and commentators commence to carve out myriad exceptions to the rule, all in aid of preserving a desired degree of flexibility. In some instances, there are so many exceptions to a rule that the rule tends more to impart confusion and inconsistency to the law than logical simplicity. Conversely, too often a rule becomes so well entrenched, and its application so automatic, that great numbers of cases are decided without any recourse to public policy at all, and the rule becomes the master of policy rather than its servant. When a legal rule reaches either of these extremes in its development, it can safely be asserted that it has ceased to have sufficient utility to justify its continued application. It has either grown so complicated and technical that it defeats its original purpose of conceptual clarity, or it has preserved its own consistency at the expense of the relative disregard of the very issues and daily personal needs and problems which it was designed to resolve. Sometimes, after a long course of development, a rule manages to achieve both extremes simultaneously.

The application in Wisconsin of the doctrine of equitable conversion presents an opportunity for an interesting case study of a

* Assistant Professor of Law, University of Wisconsin. B.A., 1960, Amherst College; LL.B., 1963, University of Wisconsin.

legal rule which may have outlived its usefulness. This seemingly simple legal rule has received the attention of Wisconsin's courts and legislature for more than a century. The history of this long development should reveal much about the extent to which this rule has proved helpful to the process of law.

II. EQUITABLE CONVERSION

The doctrine of equitable conversion, much maligned[1] but sometimes defended as well,[2] is of rather obscure origin. In its classic formulation, it purports to determine on a systematic basis the nature of the interest of a vendor and a vendee in real property[3] which is the subject of a land contract.[4] It has long been established that the vendor holds legal "title" to the land until transfer of a deed at the end of the contract period, but that this title is held only for the purpose of securing the vendee's obligation to pay the purchase price.[5] Similarly, the vendee is able to compel specific performance of the contract upon payment of the purchase price, so he is assured of eventual ownership of the land if only he carries out his own obligations.[6] Thus, the precise status of the interests of the respective parties is not immediately clear—each can be said to have something of an interest in a contract, in personality, and each can be said to have something of an interest in land, in realty, as well. Unfortunately, in many areas of the law specific classification of property as either realty or personalty—but not a mixture of both—is rquired. When this requirement is encountered in a land contract case, it becomes necessary to label the parties' interests definitively. Equitable conversion attempts to provide a means for such classification.

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[1] *See, e.g.*, Stone, *Equitable Conversion by Contract*, 13 COLUM. L. REV. 369 (1913); Pound, *Progress of the Law-Equity*, 33 HARV. L. REV. 813, 822 (1919).

[2] *See, e.g.*, Simpson, *Legislative Changes in the Law of Equitable Conversion by Contract*, 44 YALE L.J. 559, 754 (1935).

[3] On occasion the doctrine, or a rule given the same name as the doctrine, has been applied as well to contracts for the sale of personal property. *See* Bowman v. Adams, 45 Idaho 217, 261 P. 679 (1927).

[4] There are instances in which the doctrine has been applied where a land contract is not involved, such as with respect to conversion by will, under an option agreement, or by destruction of the premises, discussed *infra*. It should also be noted at the outset that the term "land contract" may be interpreted to include any contract involving a sale of land or to include only long-term contracts for the sale of land, an ambiguity which, as will be discussed, has caused considerable difficulty in Wisconsin.

[5] 55 AM. JUR. *Vendor and Purchases* § 355 (1946). The retention of such a security interest by a vendor is by express agreement, not by implication. A vendor also can assert an implied "vendor's lien" if he has delivered the deed to the vendee before receiving the full purchase price but this is not to be confused with title retention. 3 AMERICAN LAW OF PROPERTY § 11.73 (A.J. Casner, ed. 1952) [hereinafter cited as PROPERTY].

[6] *Id.* § 11.68.

Introduction of the doctrine appears to have occurred in cases involving the devolution or descent of interests in real property subject to a land contract, either under a will passing realty to one person and personalty to another, or under applicable intestacy laws.[7] Under the doctrine, the interests of a vendor in land subject to a land contract pass as personalty, and the interests of the vendee pass as realty. The reasons behind application of the doctrine in the early cases were concerned solely with the presumed intention of a decedent.[8] The basic policy consideration applicable both in the construction of wills and the interpretation of intestacy statutes was—and is—to carry out, to far as possible, the expectations and wishes of the decedent in the absence of any expressed and legally admissible directive from him.[9] Thus, it was thought that generally a decedent would have preferred his vendor's interest to pass as personalty because that interest would have been perceived primarily as a right to receive money and only secondarily as a security interest, a title to land, designed to ensure such receipt. Conversely, a vendee would receive his interest as a right to occupy[10] and eventually to "own" land, even though the title was temporarily in the hands of another person for security reasons. Thus a vendee would ordinarily expect his interest to pass as realty.

From this humble beginning, the doctrine grew to a position of pervasive influence throughout the whole range of cases dealing with the nature of vendor-vendee interests. Sometimes it has been grounded on the fact that the vendee could compel specific performance by the vendor,[11] even though in some cases this might mean that its application would proceed completely independently of any presumed intention.[12] More significantly, the doctrine has

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[7] *Id.* § 11.26; Simpson, *supra* note 2.

[8] Ingraham v. Chandler, 179 Iowa 304, 161 N.W. 434 (1917); Rockland-Rockport Lime Co. v. Leary, 203 N.Y. 469, 97 N.E. 43 (1911); Rock County S. & T. Co. v. London Assur. Co., 17 Wis. 2d 618, 117 N.W.2d 676 (1962); Estate of Bisbee, 177 Wis. 77, 187 N.W. 653 (1922); 27 AM. JUR. 2d, *Equitable Conversion* § 1 (1966); Simpson, *supra* note 2.

[9] 57 AM. JUR. *Wills* § 1133 (1948); 1 PROPERTY § 2.5.

[10] The right to occupy does not pass to the vendee automatically on execution of a land contract. 3 PROPERTY § 11.25. However, it is common for the contract to provide for occupancy by the vendee long before his payments are completed or he receives a deed. On some occasions, it is suggested that equitable conversion should not occur until the vendee is entitled to possession. *See* Appleton Elec. Co. v. Rogers, 200 Wis. 331, 228 N.W. 505 (1930). *See also* comment to proposed Wisconsin Statute § 816.30, included in A.656, Wis. Legis. (1969). But the great majority of cases concerning the doctrine hold that it applies, independent of possession. *See, e.g.*, Mueller v. Novelty Dye Works, 273 Wis. 501, 78 N.W.2d 881 (1956).

[11] *See* 55 AM. JUR. *Vendor and Purchaser* § 356 (1946); 3 PROPERTY § 11.22. The converse is also occasionally asserted, that the notion of specific performance is but an outgrowth of equitable conversion. *See* Haughwout v. Murphy, 22 N.J. Eg. 531 (1871).

[12] It is often said, for instance, that the doctrine cannot apply if, un-

been cited to support results in cases not involving descent or devise, and in cases not even concerned with the intention of either the vendor or vendee. Instead, the doctrine is now sometimes stated to mean that in all land contract cases, and for all purposes, the interest of a vendor shall be treated as personalty, and the interest of a vendee as realty.[13]

Logically extended, such a rule has very widespread ramifications. It can be determinative of the rights of creditors, or of the spouses of the vendor or vendee, and may control in cases as disparate as allocation of risk from damage or application of recording statutes.[14] The difficulty with such broad use of the doctrine is that it too often requires application of the rule without any significant policy justification other than one of conceptual consistency. This can lead, as noted above, either to self-defeating complexity and subtlety as courts strive to find exceptions to a rule not founded in substantive policy, or worse, to disregard of such policy.

The doctrine of equitable conversion has received considerable attention from the Wisconsin courts and legislature. It has been applied in a variety of instances, and its application has expressly been denied in others. The purpose of this article is to examine the treatment of the doctrine in Wisconsin and to determine whether it has served a useful role in the growth of law concerning land contracts. Through review of the development of a single, relatively simple concept in one jurisdiction, it is hoped that some light may be shed on the efficacy of the resort to conceptualized legal rules in general.

III. EQUITABLE CONVERSION IN WISCONSIN

The doctrine of equitable conversion has been before the Wisconsin Supreme Court in a variety of circumstances. The validity of the doctrine has been affirmed many times by the court:

> Upon the execution of the contract the [vendees] became, in the estimate of a court of equity, the owners of the land, and the [vendor] the equitable owner of the purchase money which they held in trust for him.[15]

However, the court has not always chosen to apply the doctrine or to give it a broad construction. In some instances, the court has reached a result that seems to repudiate equitable conversion, al-

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known to himself, the vendor will be unable to perform because there are defects in his own title. *See* 3 PROPERTY § 11.24; Stone, *supra* note 1.

[13] *See* Ritchie v. Green Bay, 215 Wis. 433, 437, 254 N.W. 113, 115 (1934): "[T]he vendee is the owner of the land for all practical purposes . . . ." *See also* Krakow v. Wille, 125 Wis. 284, 103 N.W. 1121 (1903); Gates v. Parmly, 93 Wis. 294, 66 N.W. 253 (1896).

[14] *See, e.g.*, 3 PROPERTY §§ 11.26-.35; Simpson, *supra* note 2.

[15] Gates v. Parmly, 93 Wis. 294, 66 N.W. 253 (1896).

though it has always done this without expressly abrogating the doctrine.[16] In other cases, the court has called for a very limited application of the doctrine[17] and, on a few occasions, has even implied doubts over the wisdom of using it at all.[18]

The court's willingness to cite and to apply the doctrine seems to depend primarily on the type of case in which application is sought. In one form or another, possible application of the doctrine has been an issue in cases dealing with the following legal questions: transfer of property at death; existence of dower rights; rights of creditors; responsibility for taxes and damage to property; statutes of frauds and recording statutes; joint tenancy; and existence of an equity redemption. In some of these areas the court has applied equitable conversion; in others, it has declined to use the doctrine. A review of each of these classes of cases is necessary for a full understanding of the status of the doctrine in Wisconsin.

A. Transfer of Property at Death

As noted, the doctrine of equitable conversion appears to have developed in cases dealing with the transfer of property upon the death of a vendor or vendee of real estate subject to a land contract. The Wisconsin court has been presented with the issue in a number of such cases. However, the status of the doctrine currently remains shrouded in doubt in this, the area of its origins.

There are two kinds of cases involving classification of property in an estate in which equitable conversion has figured prominently in the court's decisions, but which do not really deal with the doctrine in its orthodox form. The first of these kinds of cases includes several instances where the court has expressly affirmed the application of a doctrine of equitable conversion, but pursuant to directions in a will, not in connection with the possible consequences of any contract.[19] These cases do not deal with the nature of a property interest at death; rather, they involve the consequences of a sale of realty after the death of the owner and conclude that, in such event, the proceeds are to be regarded as realty in the estate of the owner—unless he specifically ordered the sale in his will. They thus concern conversion by will,[20] not by contract, and, be-

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16 *See, e.g.*, Olsen v. Ortell, 264 Wis. 468, 59 N.W.2d 473 (1953).

17 *See* Anderson v. Nelson, 38 Wis. 2d 509, 157 N.W.2d 655 (1968): "Generally speaking, in this state this doctrine has been given sharply limited applicability . . . ." *Id.* at 517, 157 N.W.2d 660.

18 *See* Kallenback v. Lake Publications, Inc., 30 Wis. 2d 647, 142 N.W. 2d 212 (1966); Foote v. Foote, 159 Wis. 179, 149 N.W. 738 (1914).

19 *See* Harrington v. Pier, 105 Wis. 485, 82 N.W. 345 (1900); Milwaukee Protestant Home for the Aged v. Becher, 87 Wis. 70, 58 N.W. 774 (1894); Dodge v. Williams, 46 Wis. 70, 1 N.W. 92 (1879); Chandler's Appeal: Estate of McCoy, 34 Wis. 505 (1874).

20 There are also cases dealing with conversion by trust. *See* AM. JUR. 2d *Equitable Conversion* § 5 (1966).

cause they can arise only after an express statement of intention by a testator, would seem to have little bearing on conversion by contract. However, because some of these cases contain affirmations of "equitable conversion," they create a risk of misinterpretation in later contract cases. This danger has materialized in some contract cases, and it is not uncommon to find a statement that Wisconsin recognizes and accepts the traditional doctrine of equitable conversion, backed with a citation to a conversion by will case.[21]

A second type of case which concerns equitable conversion at death, but not by land contract, involves arrangements made during the life of a testator that fall short of an ordinary land contract. Wisconsin has not clearly defined the relationship of the doctrine to offers to purchase, as opposed to long-term land contracts,[22] but the court has come down squarely on the issue of the applicability of equitable conversion to options for the purchase of land. In *Estate of Bisbee*,[23] involving the nature of an optionor's interest at his death where the option was then outstanding and unexercised, the court ruled that equitable conversion did not apply, and that an optionor's interest should be treated as realty until such time as the option was actually exercised. Thus, if the optionor should die before the exercise, his interest in the property would be fixed as realty for purposes of distribution of his estate.

Not all courts have reached this result. In several decisions, English courts have held that the granting of an option which ultimately is exercised triggers equitable conversion, even before such an exercise.[24] In *Bisbee*, the Wisconsin court refused to follow this example, largely on the grounds that equitable conversion should not take place unless the contract between the parties could be specifically enforced by both of them.

The court did not refer to what originally was thought to be the sole consideration bearing on the operation of the doctrine: the intention of the deceased owner of an interest in a contract respecting land.[25] Had it done so, the court might then have analyzed the probabilities of the exercise of an option as these were known to the decedent during his lifetime, so that it could make reasonable projections about both his expectations respecting the land and his desires for its distribution on his death. For instance, if it appeared certain that the option would be exercised in due course because

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21 *See, e.g.*, Estate of Bisbee, 177 Wis. 77, 187 N.W. 653 (1922).

22 *See* note 109, *infra*, and accompanying text.

23 *See* cases cited at note 8, *supra*.

24 *See* Lawes v. Bennet, 29 Eng. Rep. 1111 (1903); 3 PROPERTY § 11.23.

25 Nor did the court base its decision on presumed intention in *Lawes v. Bennet*. Rather it relied on the fiction of "relation back," sometimes also employed in land contract cases to reach the same result that could be achieved through equitable conversion. *See* Western L.&C. Co. v. Copper River Land Co., 138 Wis. 404, 120 N.W. 277 (1909).

the land had a market value greatly in excess of the option price, then the court might have concluded that the decedent regarded his interest as a monetary one—as an expectation of receiving the option price—and that, unless he indicated otherwise, he would expect it to pass as personalty on his death. Extended analyses of this sort, to be sure, would add greatly to the complexities of the doctrine of equitable conversion in individual cases and may thus have been thought to be undesirable.[26] But the alternative, the one adopted by the court in *Bisbee* and the one typically employed, is to apply the rule mechanistically, without much regard for the policy behind it. It is possible that refusal to apply equitable conversion in *Bisbee* frustrates what would normally be the intentions of an optionor in like circumstances, although since the case did not address itself to this issue,[27] we can never know.[28] The case appears to stand for the proposition that the doctrine is applicable only in the usual, mutually enforceable land contract, although the result may not square with the policy behind the doctrine, and although it reflects a strictness not always followed by the court.[29]

The Wisconsin court has also considered the application of equitable conversion in its traditional sense, as an aid to determine the transfer at death of property subject to an existing land contract. In two cases, *Estate of Lefebvre*[30] and *Estate of Atkinson*,[31] the court was called upon to construe a devise of real estate under a will, where the testator subsequently sold the land on land contract.[32]

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[26] It should be noted that comparable analysis consistent with the policy supposedly behind the doctrine, but entailing considerable possible complexity, would be suitable in ordinary land contract cases. Thus, a vendee may already be in default, or it may be evident that he will default in the future. In such a case he may consider his interest only as a debt while the vendor thinks of his own interest as realty—all contrary to the usual expectations carried out by equitable conversion. Courts have not engaged in such analysis in ordinary land contract cases either.

[27] The court did note that to treat options as personalty in the estate of an optionor upon their exercise could tie up the estate until the exercise period had run, a result which the optionor would presumably not have intended.

[28] The result of *Bisbee*, of course, is unequivocal and attempts have been made to codify it to classify the optionee's interest as personalty and the optionor's as not a "security interest". Proposed Wisconsin Statute § 816.30 in A.656, Wis. Legis. (1969).

[29] *See, e.g.*, Rock County S. & T. Co. v. London Assur. Co., 17 Wis. 2d 618, 117 N.W.2d 676 (1962).

[30] 100 Wis. 192, 75 N.W. 971 (1898).

[31] 19 Wis. 2d 272, 120 N.W.2d 109 (1963).

[32] Where a testator devises land under a will made after execution of a land contract, his devisee usually takes the proceeds unpaid at the death of the testator, notwithstanding equitable conversion. Covey v. Dismoor, 226 Ill. 438, 80 N.E. 998 (1907); Heirs of Wright v. Minshall, 72 Ill. 584 (1874). Drawing a distinction between cases of sale before the making of a will and of sale afterwards makes little theoretical sense because of the revocable nature of wills, but it certainly is well-grounded in policy as an implementation of probable intent.

The solution is clear under equitable conversion: the testator, as vendor, no longer held what he would regard as an interest in real estate under his will; rather he held an expectation of receiving money, secured by a land contract. This he would intend to pass as personalty, not to be passed at all under a specific devise of realty. However, in *Lefebvre*, decided in 1898, the court did not cite the doctrine. Instead, it noted common law rules favoring revocation[33] in similar fact circumstances, construed a Wisconsin statute to reverse the common law on this point,[34] and relied heavily on what it felt was the intention of the testator[35] to conclude that the property should pass to the devisee, who consequently held both the land contract for security and the right to receive payments from the vendee.[36] The result seems well-justified in policy, if the policy at issue

[33] Use of the term "revocation" in *Lefebvre* was corrected to "ademption" in Estate of Atkinson, 19 Wis. 2d 272, 120 N.W.2d 109 (1963).

[34] The statute cited was WIS. REV. STAT. § 2278 (1878), now WIS. STAT. § 238.02(1) (1967), which provides that a devise of land in a will, unless a contrary intent appears in the will, shall be construed to pass "all the estate of the devisor therein which he could lawfully devise." The court had previously construed the purpose of this statute to be to abrogate a common law presumption limiting devisees to a life estate, unless their testator expressed a wish that they take a fee. Dew v. Kuehn, 64 Wis. 293, 25 N.W. 212 (1885). In *Estate of Atkinson*, the court, by implication, criticized this construction of the statute, but refused to overrule it. The new Probate Code (effective April 1, 1971), however, may amount to legislative overruling of the issue. The code creates WIS. STAT. § 853.31 which substantially restates the provisions of § 238.02(1) (1967). The analysis of the Wisconsin Legislative Reference Bureau, which follows this section cites *Dew v. Kuehn* and its interpretation of the purpose of the statute, but omits mention of both *Lefebvre* or *Atkinson*. SPECIAL PAMPHLET, WEST'S WIS. STAT. ANN., PROBATE CODE 50 (1970) [hereinafter cited as SPECIAL PAMPHLET].

[35] The court ascertained the intention of the testator in this way: the will of the testator showed he did not wish any of his property to pass intestate; however, the will lacked a residuary clause, so a holding that the vendor's land contract interest did not pass under a devise of the land would force the interest into intestacy. This would frustrate the testator's intention. In *Estate of Atkinson*, 19 Wis. 2d 272, 120 N.W.2d 109 (1963), the court was asked to distinguish *Lefebvre*, because in *Atkinson* the testator's will did include a residuary clause. However, the court declined to do this, stating instead that the "testator's intent is irrelevant when considering an ademption question," making the presence or absence of a residuary clause "wholly irrelevant" to the issue. 19 Wis. 2d at 278-79, 120 N.W.2d at 113 (1963).

[36] It might theoretically be possible for a court to conclude that a vendor's right to receive payments under a land contract should pass as personalty under equitable conversion, while his security interest in the land, the title to the land, should still pass to his heir as realty. This would violate the rule that a security instrument should never be separated from the debt, the payment of which it secures. *See, e.g.* Church v. Smith, 39 Wis. 492 (1876). Accordingly, when equitable conversion is applied, it is normally applied both to the debt due and to the security instrument which follows the debt. 3 PROPERTY § 11.26. A similar problem can arise with respect to descent of a vendee's interest under a land contract, namely, whether equitable conversion should apply only to ensure

is conceded to be the implementation of the wishes of the testator; but the court achieved this result only through difficult statutory construction and complete disregard of any notion of equitable conversion.

The *Atkinson* case was decided in 1963, some 65 years after *Lefebvre*. In *Atkinson* the court did recognize equitable conversion and did state that, according to the doctrine, the interest of a vendor in a land contract should *not* pass to his specific devisee under his will.[37] It also noted that common law rules of ademption urged a result opposite from the one reached in *Lefebvre*, that the statutory construction used in *Lefebvre* to overturn the common law was open to question,[38] and that judicial reliance on the policy basis adopted in *Lefebvre*—the carrying out of a testator's intention—was erroneous when applied to ademption.[39] Despite all this, the court refused to overrule *Lefebvre* because it was a case construing a property statute and had been in existence for 65 years without any effort by the legislature to change it.[40]

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that the land should pass ultimately to heirs as realty when payments due are made by the heirs, or whether it should further mean that such payments should be made not by the heirs but from the personal estate of the deceased. Most courts extend the doctrine fully to the latter position, holding that a vendee's heir takes the land exonerated from any contract obligation to pay for it. 3 PROPERTY § 1126. Wisconsin has not yet passed on this specific point, but the court has affirmed the notion of exoneration in connection with devises of land subject to a mortgage, Estate of Budd, 11 Wis. 2d 248, 105 N.W.2d 358 (1960), and has held that where a surviving joint tenant pays off a mortgage, he is entitled to contribution from the estate of the deceased joint tenant. Estate of Rosenthal, 34 Wis. 2d 402, 149 N.W.2d 585 (1967).

[37] To establish that Wisconsin does recognize equitable conversion, the court relied on Krakow v. Wille, 125 Wis. 284, 103 N.W. 1121 (1905), and Mueller v. Novelty Dye Works, 273 Wis. 501, 78 N.W.2d 881 (1956). Neither involved any questions of a testator's intent; rather, both are discussed *infra* as examples of an extension of the doctrine to areas beyond the scope of the policy in its traditional area of operation. No explanation was offered in these two cases as to why the doctrine should be so extended from its common law base, and none is offered in *Atkinson* as to why application of the doctrine in those other areas should stand as precedent relevant to cases dealing with testate succession.

[38] *See* note 34, *supra*.

[39] This aspect of the *Atkinson* decision is implicitly criticized by the Wisconsin Legislative Reference Bureau in its comments to new WIS. STAT. § 853.35(3). SPECIAL PAMPHLET 53. It is also criticized in Comment, *Ademption By Extinction and Equitable Conversion*, 1964 WIS. L. REV. 149, which notes that in another recent Wisconsin case, Rock County S. & T. Co. v. London Assur. Co., 17 Wis. 2d 618, 117 N.W.2d 676 (1962), the court refused to apply ademption, partially on the grounds that this would frustrate the testator's intent. Complete disregard of a testator's intent in ademption cases does not harmonize with the overall probate policy of carrying out such intent. Nor does it fit in with the recognized basis for equitable conversion—the testator's probable intent—cited in the same *Atkinson* opinion as generally applicable.

[40] One might argue that *Atkinson* did indeed overrule all the significant rules of law and the policy bases established in *Lefebvre*, leaving in-

The court dealt summarily with another issue raised in *Atkinson* concerning the effect of a statute, passed after *Lefebvre*, which requires that the inventory of the property of a decedent list a vendor's interest in a land contract as personalty, and a vendee's as realty.[41] The court held that this statute was a mere codification of the common law of equitable conversion, a rule in effect long before *Lefebvre*, and, therefore, one which could not now be applied without overruling *Lefebvre*.[42] This ruling on the statute, coupled with the court's deference to *stare decisis*, left the future status of the statute in considerable doubt. Perhaps for this reason, the statute is repealed under the new Probate Code.[43]

More important, the recognition of the doctrine of equitable conversion in *Atkinson*, and the subsequent refusal by the court to apply either common law or statutory versions of the doctrine in that case, casts doubt on the present status of the rule in all cases dealing with devises of land by a testator who subsequently sells the land under a land contract. This doubt is reinforced by the failure of the new Probate Code to deal with this issue—although the Probate Code does greatly clarify the law with respect to ademption, partially in response to the *Atkinson* case.[44] It may well be that in this class of cases the doctrine no longer exists in Wisconsin. If this is so, the position was reached in a case in which the court expressly disclaimed any significance of the intention of a testator, the one factor historically cited as the policy reason behind the doctrine.

The *Atkinson* case may conceivably also have adverse ramifications respecting application of the doctrine in cases dealing with estates of vendees under a land contract, although this seems unlikely.[45] Meanwhile, application of the doctrine to cases involving

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tact only the specific, technical holding of the case as binding under exactly parallel factual circumstances.

41 WIS. STAT. § 312.01(4) (1967).

42 To establish that equitable conversion existed in Wisconsin prior to *Lefebvre*, the court cited Milwaukee Protestant Home for the Aged v. Becker, 87 Wis. 409, 58 N.W. 774 (1894), a case dealing with conversion by will, not conversion by contract as this affects a will. In the former type of case, the testator's intent must be expressed in his will; in the latter, the doctrine is employed precisely to preserve such intent when none is expressed. The "equitable conversion" described in the cited case is not concerned with the legal policies embodied in the discussion of equitable conversion under the *Atkinson* facts and present, but not discussed, in *Lefebvre*. *See* text accompanying note 19, *supra*.

43 New WIS. STAT. § 853.15, SPECIAL PAMPHLET, *supra* note 34, at 37-39.

44 Under the Probate Code, WIS. STAT. § 853.35(3) is created to provide that if property specifically devised in a will is sold by the testator within two years of his death, the beneficiary under the will takes any part of the purchase price not paid at the testator's death and receives a pecuniary legacy equal to payments received by the testator during the last year before his death. Under WIS. STAT. § 853.35(1), however, prior law with respect to ademption by sale continues in force if it does not fit within the two year limit of WIS. STAT. § 853.35(3) (1969). SPECIAL PAMPHLET 51-52.

45 The potential for extension of the *Atkinson* rule to cases concerning

intestacy has been rendered moot by legislative passage of the Probate Code, which abrogates former distinctions between descent of realty and personalty.[46] Therefore, the doctrine has dubious validity in many, perhaps all, testate cases and is no longer relevant in intestacy. In Wisconsin, in cases concerning the transfer of property at death—ironically the very type of case which gave the doctrine its birth—the position of equitable conversion is insecure at best.

B. Dower Rights

Rights of dower (and curtesy) do not depend on the intent of a land owner or a party to a land contract. Rather, such rights are the result of a social judgment favoring protection and support for a surviving spouse, regardless of the intent—often in oppositon to the intent—of the deceased spouse. Thus, it would seem that the doctrine of equitable conversion, derived from cases dealing with testate and intestate succession and with a decedent's presumed intent, would not be applicable to cases concerned with dower. Indeed, in cases involving common law dower, the courts generally have held that a vendee's widow has no dower, notwithstanding equitable conversion.[47]

Rights of dower in the United States are now everywhere prescribed by legislation, so the question of dower in realty subject to a land contract turns on interpretation of statutory terms; in Wisconsin, it depends on whether the husband was "seized of an estate of inheritance" in land during the marriage.[48] In construing dower statutes, the courts have often employed the doctrine of equitable conversion to conclude that a widow should be denied dower where her husband executed a land contract as vendor prior to the mar-

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the estates of land contract vendees is raised by the possibility of the rigid application of notions of conceptual mutuality: if the doctrine could not apply to vendor's estates, it also could not apply to vendee's estates, either with respect to passing of the land itself or to exoneration from a land contract debt obligation. It is certainly to be hoped that *Atkinson* will not be so extended, as this would only further confuse the status of equitable conversion in Wisconsin and further frustrate the policies behind the doctrine. There are indications that the court will not extend *Atkinson*. In one case, *Atkinson* is cited as leading authority for the recognition of the doctrine of equitable conversion. *See* Estate of Fischer, 22 Wis. 2d 637, 126 N.W.2d 596 (1964).

[46] *Compare* WIS. STAT. §§ 237.01, 318.01 (1967) *with* new WIS. STAT. § 852.01 (SPECIAL PAMPHLET 10-12), which, as the comment by the Wisconsin Legislative Reference Bureau notes, "eliminates present obsolete distinctions dependent upon the type of property owned by the decedent." SPECIAL PAMPHLET 12.

[47] *See* Annot., 66 A.L.R. 65 (1930).

[48] *See* WIS. STAT. § 233.01 (1967), respecting dower. Under present Wisconsin law, a surviving husband has curtesy in land of which his wife died seized, providing she did not dispose of it by will. WIS. STAT. § 233.23 (1967).

riage.[49] But they have been less willing to use the doctrine to hold that a widow should be granted dower where her husband was the vendee under a land contract. In the latter instance, many courts still have held against dower, unless the vendee has paid in full.[50] If full payment was made before the vendee-husband's death, the courts have announced a belated application of equitable conversion to give the husband the necessary degree of interest in the land to support dower for his widow. Thus, courts have applied the doctrine only some of the time in dower cases, depending on whether the husband was vendor or vendee, with the anomalous result that, in many jurisdictions, nobody can be said to be "seized of an estate of inheritance" in realty subject to an executory land contract.

Wisconsin appears to be such a jurisdiction. In an early case the court stated as dictum that a vendor's widow should not be entitled to dower because her husband did not have seizin, although this result was not expressly grounded on equitable conversion.[51] In other cases, the court has held that a vendee's widow also should be denied dower,[52] even if her husband had entered into possession,[53] although dower has been granted where the purchase price was fully paid by the vendee-husband during his life.[54] Some of these cases arose under peculiar factual circumstances that suggest they be relied upon only with caution,[55] and in none of them did the court analyze whether or not the doctrine of equitable conversion is even relevant to the issue of dower. But the cases do reach conclusions

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[49] *See* Annots., 63 A.L.R. 136 (1929) and 8 A.L.R.3d 569 (1966). It is clear, of course, that dower does attach to realty which a husband sells at some time after entering into marriage, whether or not equitable conversion applies to change the status of the husband's interest upon the sales contract, for in such case dower will have attached prior to the sale.

[50] *See* Annot., 66 A.L.R. 65 (1930).

[51] Madigan v. Walsh, 22 Wis. 478 (1868).

[52] Will of Prasser, 140 Wis. 92, 121 N.W. 643 (1909) (dictum); Inglis v. Fohey, 136 Wis. 28, 116 N.W. 857 (1908).

[53] Olsen v. Ortell, 264 Wis. 468, 59 N.W.2d 473 (1953).

[54] Harley v. Harley, 140 Wis. 282, 122 N.W. 761 (1909). The court also held that the vendee had a sufficient interest in a "house" and "land" to qualify his holding as a "homestead" under the applicable statutes. (*See* WIS. STAT. §§ 990.01(13), 237.02 [1967]). Under the new Probate Code, the concept of homestead is abandoned for probate purposes, although the concept is still significant for purposes of exemption from execution. *See* new WIS. STAT. §§ 852.01, 861.03-.17 (SPECIAL PAMPHLET 10-12, 91-102).

[55] For instance, in Olsen v. Ortell, 264 Wis. 468, 59 N.W.2d 473 (1953), a foreclosing vendor joined the vendee's wife in the action, and she objected on the grounds that she did *not* have dower—her rights in the property were to be forfeited regardless of how the dower and equitable conversion issues were resolved. And in Harley v. Harley, 140 Wis. 282, 122 N.W. 761 (1909), suit was brought by the vendor against the widow of a vendee who had fully paid. Thus, whether or not the widow had dower or homestead rights, the party suing had no cause of action against the land or anyone on it.

that appear, at least, to define the doctrine and to limit greatly its significance. The holding that a vendee can achieve ownership of an "estate of inheritance" in land, but only upon completion of *all* his obligations under a land contract, seems to imply that in this context equitable conversion takes place at a time later than mere execution of the contract. The court stated in one dower case, "her husband had no title, legal or equitable, at the time he made the contract with the plaintiff but only a mere contract right to purchase."[56] Similar implications about the time of application of the doctrine were to be raised in subsequent cases dealing with different issues—all without review of any policies behind the doctrine.[57]

What the court might have meant in the dower cases is that equitable conversion as a doctrine has limited, if any, application to cases involving the social policies behind dower statutes. This would be reasonable enough, since, as noted, the doctrine of equitable conversion developed as an aid for carrying out presumed intentions of parties to a land contract, and such intentions are not relevant to questions of dower. However, the language of the court in the dower cases is not so qualified. Because of this, these cases inject confusion into the law of Wisconsin respecting the time of commencement, even the existence, of equitable conversion. This in turn, of course, impairs the value of the doctrine as a simplifying and clarifying force.

Further questions concerning the existence of dower and curtesy in realty subject to a land contract are effectively rendered moot by the new Probate Code, which abolishes all rights to inchoate dower or curtesy, and instead grants a surviving spouse certain rights in the net estate of the deceased spouse.[58] Under the new statutes, it will no longer matter whether the interests of a deceased spouse in a land contract are classified as an estate of inheritance in lands or as some other property interest. Thus, the holdings of previous Wisconsin dower cases will have no value as specific precedent. It is to be hoped that this will cause the court to decline to carry forward the implications in these cases about the nature and application of the doctrine of equitable conversion, particularly those concerning the time of commencement of the doctrine.

C. Rights of Creditors

It may be important for creditors of a vendor or vendee under a land contract to ascertain whether their debtor has an interest in land sufficient to sustain liens created by statute. For instance,

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[56] Olsen v. Ortell, 264 Wis. 468, 470, 59 N.W.2d 473, 474 (1952), quoting Inglis v. Fohey, 136 Wis. 28, 116 N.W. 857 (1908).

[57] *See, e.g.*, Andersen v. Nelson, 38 Wis. 2d 509, 157 N.W.2d 655 (1968), discussed *infra*.

[58] *See* new WIS. STAT. §§ 852.01, 861.03-.17 (SPECIAL PAMPHLET 10-12, 92-102).

many states have statutory provisions automatically granting a judgment creditor lien protection on real estate owned by the debtor upon proper docketing of the judgment.[59] Where the debtor is involved in a land contract, the classification of his interest as realty or personalty may determine whether or not the creditor has any lien. Where the debtor is insolvent, this may indeed be a very important point for the creditor.

The doctrine of equitable conversion as traditionally conceived, has little relevance to the issue of the rights of creditors because that issue hardly turns on a presumed intention of vendor or vendee respecting the nature of his interest in the land. The inappropriateness of the equitable conversion doctrine in this area has, on occasion, led the courts to state firmly that the doctrine should be restrictively applied:

> The doctrine of equitable conversion is a fiction . . . it should never be overlooked that there is no real conversion; the property remains in fact realty or personalty as it were, *but for the purpose of the will, so far as necessary and only so far,* it is to be treated in contemplation of law as if it had been converted.[60]

However, the doctrine has, nevertheless, been applied to aid in the resolution of cases dealing with the rights of creditors. In such cases, the courts usually hold that, because of the doctrine, a vendee's land contract interest is realty, and a vendor's, personalty.

The Wisconsin Statutes provide that a judgment shall, upon docketing, be a lien on the "real property" of the debtor in the county where docketed.[61] This provison has been at issue a number of times in cases involving debtors with land contract interests. The court's interpretation of the statute has, in part, utilized the doctrine of equitable conversion.

There are two separate and distinct judgment lien problems that can arise under land contract cases. The first, and the one generally present under the facts of the Wisconsin cases, is whether any lien or interest which a judgment creditor may obtain takes priority over the interest of the other party to the land contract; for instance, whether a judgment docketed against a vendor should become a lien against the rights and interests of the vendee. This question has been presented squarely, and in a series of cases the court has stated

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[59] The doctrine also has potential significance under the statutes concerning mechanics' or contractors' liens and exemptions from execution granted with respect to homesteads, for application of these statutes also can turn on whether a debtor's interest in property amounts to realty. *See* Delap v. Parcell, 230 Wis. 152, 283 N.W. 305 (1939), and WIS. STAT. ch. 289 (1967); and Foote v. Foote, 159 Wis. 179, 149 N.W. 738 (1914), and WIS. STAT. §§ 272.20, 990.01(13), (14) (1967).

[60] Foote v. Foote, 159 Wis. 179, 183, 149 N.W. 738, 739 (1914), quoting Yerkes v. Yerkes, 200 Pa. 419, 50 A. 186 (1901) (emphasis added).

[61] WIS. STAT. § 270.79(1) (1967).

that the vendor's judgment creditor does not prevail against the vendee.[62] This result seems unavoidable, with or without regard to the doctrine of equitable conversion. It has long been recognized that both vendor and vendee have an equitable position of security vis-à-vis each other,[63] and, under the facts of all cases presented, this position was achieved before the interest of the judgment creditor. Thus, one would expect the courts to favor a vendee over the vendor's judgment creditor, whether the vendor's land contract interest is considered realty or personalty under the judgment lien statutes, particularly where the vendee has paid the full purchase price before docketing of the judgment.[64] Where only part of the price has been paid, the vendee should be able to acquire the property free of the judgment lien by paying somebody the balance of the price, but there could be an issue concerning whom he should so pay, the vendor or judgment creditor. This question too has been raised in Wisconsin, in the well-known *Mueller v. Novelty Dye Works* case.[65] The facts of this case raised important issues respecting the goals and policies of the judgment lien statutes as well as the very difficult problems of required notice to the vendee,[66] and of the possible splitting of debt and security.[67] But the court failed to discuss these issues. Rather, the

[62] *See* Wenzel v. Roberts, 236 Wis. 315, 294 N.W. 871 (1940), citing Stanhilber v. Graves, 97 Wis. 515, 73 N.W. 48 (1897), and holding that if the vendee is in default, he may not prevail over vendor's judgment creditor. *See also*, Mueller v. Novelty Dye Works, 273 Wis. 501, 78 N.W.2d 881 (1956).

[63] A vendor, for instance, has an implied equitable lien for any unpaid purchase price of land, even after he has delivered the deed to his vendee. *See* Church v. Smith, 39 Wis. 492 (1876); 3 PROPERTY § 11.73. A vendee receives financial protection, approximately to the degree to which he has achieved financial equity in the property, through the equity of redemption should he default, and otherwise through the remedy of specific performance. *See* Button v. Schroyer, 5 Wis. 598 (1855); 3 PROPERTY § 11.68.

[64] *See* Wenzel v. Roberts, 236 Wis. 315, 294 N.W. 871 (1940); Blaha v. Borgman, 142 Wis. 43, 124 N.W. 1047 (1910).

[65] *See* note 10, *supra.*

[66] If it were held that the vendee should pay the lien creditor, rather than the vendor, there would have to be some way to ensure that the vendee would be so notified. It might be argued that the docketing of judgment itself gives constructive notice of the creditor's position, but it is unrealistic to anticipate that vendees would regularly search the judgment rolls after execution of the land contract. Courts have been very solicitous of the vulnerability of vendees in like circumstances. *See, e.g.*, First Nat'l Bank v. Chafee, 98 Wis. 42, 73 N.W. 318 (1897); Morris v. Bacon, 123 Mass. 58 (1877).

Compare WIS. STAT. § 235.52 (1967) with ch. 285, § 23, [1969], Wis. Laws —, *creating* WIS. STAT. § 706.08(6) (WEST'S WIS. LEGIS. SERVICE 1382 [1970]), respecting the effect of assignments by a mortgagee on payments by his mortgagor.

[67] Courts have long inveighed against the dangers and confusion courted by permitting one person to hold a debt while another holds the enforceable security for its payment. *See* note 36, *supra*; Fred Miller Brewing Co. v. Manasse, 99 Wis. 99, 74 N.W. 535 (1898).

case was decided simply through reference to equitable conversion: since the vendor's interest was only personalty, the judgment lien statutes, restricted to realty, did not apply at all.

This use of the doctrine of equitable conversion, as noted, bears no logical connection to the original purposes of the doctrine. It caused the court to ignore what were the really important issues raised by the case, and it also helped create the possibility that the doctrine would be extended to solve the second distinct problem that can arise in land contract-judgment lien cases: resolution of disputes between two or more competing creditors of a single party to the land contract.

Treatment of this second problem cannot turn on the expectation of the parties to the contract, for that is not at issue. A typical case in which the problem might be raised would be where two creditors of a vendor, one a judgment creditor, were contending for priority and where the vendee was willing to pay either (or the vendor), or became himself in default.[68] *Mueller v. Novelty Dye Works* appears to control such a case, but it says nothing about the central issues raised, namely the purposes of the judgment lien statutes and, more generally, the treatment of unilateral efforts by unsecured creditors to secure priority over other creditors.[69] Thus, the doctrine of equitable conversion may have intruded into the area of relative creditors' rights to the exclusion of analysis of the many difficult substantive issues in this area.

There are indications that the court will not so use the doctrine. In a very early case, the Wisconsin court was presented with the issue of the validity of a judgment lien against a vendee's interest.[70] Rather than decide the issue on the basis of equitable conversion, the court upheld the lien only because of what it felt to be the broad policies inherent in the judgment lien statute.[71] In another case, the

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[68] The application of the doctrine might well be of import to a trustee in bankruptcy as well. Representing the unsecured creditors of a vendor, a trustee could not upset a judgment lien obtained more than four months prior to the filing of a petition, if the lien were then validly obtained. *See* § 67(a) of the Bankruptcy Act, 11 U.S.C.A. § 107(a) (1953).

[69] Among other purposes, judgment lien statutes are probably designed to reduce the likelihood that creditors will find it necessary to resort to the onerous and time consuming procedures for execution against various forms of their debtors' property, such as are provided in Wisconsin by Chapters 226, 267, 272 and 273 of the Statutes. To conclude that a vendor's interest in a land contract is not susceptible to such a judgment lien increases the probability that other remedies will be sought after, without any apparent advantage being gained by the vendor-debtor. Therefore, to apply the doctrine of equitable conversion in this context appears to contradict at least one of the policies behind the statutes being construed.

[70] Van Camp v. Peerenboom, 14 Wis. 70 (1861).

[71] In another case involving a judgment lien docketed against a vendee, however, the court did cite equitable conversion and also failed to discuss the policies defining interpretation of judgment lien statutes. Bartz v. Paff, 95 Wis. 95, 69 N.W. 297 (1897).

court upheld a claim that a vendee's interest was exempt as a homestead, not because of the operation of the doctrine of equitable conversion, but because this was consistent with the policies and broad phrasing of the applicable statutes.[72] The court's most explicit statement on the applicability of equitable conversion to issues concerning creditors' rights and priorities came in a case involving Indiana law.[73] The court did recognize the doctrine, even noting that it is nearly "universal," but pointed out, as dicta, that the question whether a docketed judgment against a vendor is a lien on his interest (or on the land itself) "is entirely unrelated to the question of whether the doctrine of equitable conversion applies."[74] Therefore, there is at least indirect precedent supporting the proposition that equitable conversion has no applicability in this area.

In sum, the doctrine of equitable conversion has been of little help to the courts in cases involving creditors' rights. There are some intimations by the Wisconsin court that the doctrine should not be used at all in this area. However, there are several cases where the doctrine has been cited, sometimes to the exclusion of the serious substantive questions raised, and sometimes without apparent regard for the possible consequences of its use in future cases where the parties to a land contract are not themselves involved in a dispute. In the absence of statutory modification,[75] the limits of the doctrine in this area will remain uncertain.

D. Taxes and Damage to the Property

There are many possible issues that can arise where property subject to a land contract is damaged. One party to the contract may seek to sue the other for causing the damage, or if the damage is caused by a third person, either party may seek to sue that person. The parties may also litigate among themselves the responsibility for accidental damage or the allocation of insurance proceeds received. The parties may also be concerned about proper allocation of the burden of real estate taxes.

When the parties to a land contract contest the sharing of taxes or accidental loss, or when they are suing each other, the case will turn on interpretation of the intent of the parties. To this extent the doctrine of equitable conversion might be applicable, for it, too, is designed to carry out the presumed intent of the parties; how-

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[72] Chopin v. Runte, 75 Wis. 361, 44 N.W. 258 (1890); *see also* Foote v. Foote, 159 Wis. 179, 149 N.W. 738 (1914).

[73] Colignon v. Artz, 205 Wis. 51, 236 N.W. 585 (1931).

[74] *Id.* at 56.

[75] Proposed WIS. STAT. § 816.31(2), contained in A. 656, Wis. Legis. (1969), which was rejected by the legislature, attempted to codify application of equitable conversion to judgment liens. The wording of this section is ambiguous, but appears to provide that a judgment would be a lien on a vendee's interest, but not on a vendor's.

ever, it must be stressed that an intent of one party with respect to succession at death may be very different from a mutual intent about damage questions. Issues concerning rights of action against third persons do not turn on the intent of the parties, and hence would not seem to be much connected with equitable conversion. However, the doctrine has been widely applied throughout this area of the law.[76]

The Wisconsin court has faced these issues in several cases and has shown a willingness to use the doctrine in some instances, while disregarding it in others. It has usually paid more heed to the practicalities of a particular situation than to adherence to an abstract legal doctrine. Perhaps the most widely known case in this area is *Appleton Electric Co. v. Rogers.*[77] In this case, the court decreed that the risk of loss in property subject to a land contract turns on possession of the premises at the time of the loss. This was a forward-looking approach to the problem, and it has since been codified in Wisconsin and elsewhere under the Uniform Vendor and Purchaser Risk Act.[78] This result was reached independently from, even in opposition to, the doctrine of equitable conversion; but the court based its opinion on the conclusion that this is what the parties must have intended under the contract.[79] In addition, this result, by placing the risk of loss on the possessor, who is most able to take steps to avoid accidental damage, should help to minimize the occurrence of such damage. Thus, the opinion is based on firm policy considerations. The opinion is much sounder than it would have been if it had merely relied on automatic application of equitable conversion, which might have caused the court to ignore the policy questions it discussed so well. Moreover, under the doctrine, the risk of loss would turn not on possession, but on execution of the contract, and thus might fall on the party least able to control possible damage.

The court has been less flexible in its treatment of questions concerning responsibility for real estate taxes. In cases in this area, where there is no contractual agreement on the point, the court has invoked the doctrine to the exclusion of an analysis of applicable statutes and of the substantive policies raised, all in a manner that adds confusion both to the allocation of taxes and to the time of commencement of the doctrine itself.[80] And, in a case involving con-

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[76] *See* Simpson, *supra* note 2.

[77] *See* note 10, *supra.*

[78] WIS. STAT. § 235.72 (1967). *See also* ch. 285, § 23, [1969] Wis. Laws —, *creating* WIS. STAT. § 706.12 (6 WEST'S WIS. LEGIS. SERVICE 1385 [1970]).

[79] Despite the language of this case, it may be partly responsible for the notion that application of equitable conversion turns on possession rather than contract execution. *See, e.g.*, comment of the Legislative Reference Service to proposed WIS. STAT. § 816.31, A. 656, Wis. Legis. (1969).

[80] Williamson v. Neeves, 94 Wis. 656, 69 N.W. 806 (1897).

struction of a statute defining exemptions from realty taxes, the court relied on a classic extension of the doctrine from one legal area to another: "In view of the fact that the vendee is the owner of the land for all practical purposes, it is concluded that it is the owner within the meaning of the statutes."[81] The court did not analyze why this conclusion followed from the stated premise, and in this way did not address itself to the only real issue raised: the intended breadth and meaning of the tax exemption statutes.

The court has also used the doctrine in other damages cases. In one instance, it strongly affirmed the existence of the doctrine and cited it as reason for permitting a vendee to sue his vendor in conversion for damage inflicted by the vendor.[82] It might be argued from this that a vendor could not maintain an action against a vendee for damage caused by the latter, but in an early case the court rejected this possibility.[83] The court has had more difficulty in dealing with instances of damage caused by third parties. It, in effect, followed the doctrine when it allowed a vendee to maintain an action for trover against a third person for logs removed by the latter;[84] but it was unable to break away from equitable conversion in a case where the vendor under a land contract was the party bringing suit against a third person.[85] It held that the vendor did not have sufficient interest in the land to maintain his suit and that his only apparent remedy was either to sue the vendee (who was already in default), or to bring a proceeding to stay waste (which could be of little value after occurrence of the waste). The court did not discuss the nature of the interest retained by the vendor or the extent to which, for reasons of policy, he ought to be able to recover for its impairment. It seemed rather to hold that for purposes of this case, at least, the vendor held no interest at all in the land, even though the vendee was in default.

Therefore, in cases concerning the risk of loss and of taxes, the court has sometimes applied the doctrine of equitable conversion, sometimes ignored it. When the doctrine has been applied, it has sometimes resulted in avoidance of discussion of the other legal issues raised by a case. In this area, the doctrine seems to have reached both extremes of its development: it has become incon-

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81 Ritchie v. Green Bay, 215 Wis. 433, 437, 254 N.W. 113, 115 (1934), construing WIS. STAT. § 70.11(4) (1967).

82 Krakow v. Wille, 125 Wis. 284, 103 N.W. 1121 (1905).

83 Kimball v. Darling, 32 Wis. 675 (1873). In another early case, an analogous issue arose when a mortgagee sued his mortgagor for damage to the property. The mortgagor defended on the basis that in a "lien theory" jurisdiction, a mortgagee lacks sufficient "title" to sue. This use of lien and title theories of mortgagee is every bit as artificial as some of the uses of the doctrine of equitable conversion. In this instance, the court squarely repudiated such reasoning. Jones v. Costigan, 12 Wis. 757 (1860).

84 Martin v. Scofield, 41 Wis. 167 (1876).

85 Northrup v. Trask, 39 Wis. 515 (1876).

sistent and complex itself, and it has simultaneously been applied mechanically to the exclusion of an analysis of issues and policies raised by individual cases.

E. Statutes of Frauds and Recording Statutes

In most states, both statutes of frauds and recording statutes treat real property differently from personal property. Thus, the doctrine of equitable conversion has potential significance in land contract cases arising under either type of legislation. However, this is one area where, in Wisconsin at least, this potential has not been realized.

Wisconsin's recording statutes are stated to apply to instruments transferring "any estate or interest in real estate . . . or by which the title to any real estate may be affected in law or equity."[86] At one time the statutes excepted from coverage "executory contracts for the sale or purchase of land," and it was not at all certain that a land contract itself was subject to recording.[87] The exception has been deleted, however, and today it is accepted that the basic contract, if properly drawn, is a recordable instrument. What may not be so clear is the status of assignments, either by vendor or vendee, of the respective interests of these parties to the basic contract.

One could argue that, by virtue of the doctrine of equitable conversion, the interest of a land contract vendee is realty and subject to the recording statutes, while the interest of the vendor is personalty and free from coverage. The argument suffers from the same defect that attaches to any other automatic extension of the doctrine: it does not bear any relation to the policies or legislative intention behind the recording acts. The statutes are designed to eliminate secret liens, and thus to facilitate property transfers and acquisition of credit where these relate to a commercially significant interest in identifiable real property. Where the interest is substantial—both a vendor's and a vendee's interests certainly have commercial value—and where the interest does relate to identifiable land, there seems to be little reason for exclusion from recording statute coverage, regardless of whether one of the interests may be termed less than realty for other purposes.

The Wisconsin court has not been disposed to carry the doctrine

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[86] WIS. STAT. § 235.50 (1967). The new WIS. STAT. § 706.01(1) applies to transactions "by which any interest in land is created, aliened, mortgaged, assigned or may be otherwise affected in law or in equity." Ch. 285, § 23 [1969] Wis. Laws —, *creating* WIS. STAT. § 706.01(1) (6 WEST'S WIS. LEGIS. SERVICE 1371 [1970]).

[87] *See* First Nat'l Bank v. Chafee, 98 Wis. 42, 73 N.W. 318 (1897). Of course, if the vendee went into open and notorious possession, he was protected in any event from attempted transfers of his rights by his vendor.

over into recording problems. There do not seem to be any cases concerning the recordability of an assignment by a land contract vendee where the doctrine is mentioned, perhaps because a rule favoring recordability follows whether the doctrine or public policy is cited as the reason. However, in at least one instance the court has been called upon to consider the consequences of a failure to record (or to put into recordable form) an assignment by a vendor.[88] The court held that the failure caused the assignment to be subordinate to a later mortgage by the vendor,[89] which was duly recorded. The court did not cite the doctrine of equitable conversion; but, by its holding, it found that the doctrine did not apply to recording, that both a vendor's and a vendee's interest could be an interest in land for this purpose.[90]

The Wisconsin court also seems to have concluded that statutes of frauds relating to realty[91] are not affected by the doctrine, although not in the way one would expect. The court has not held that the assignment of a vendor's interest is subject to the statutes of frauds, as it has with respect to recording requirements. Rather, it has held that in some respects, a vendee's interest is not.

In two early cases dealing with the statutes of frauds, the court concluded that an exception in the statute for transfers "by act or operation of law" includes acts of the parties as well as of the legislature.[92] Then, in a third case, the court was confronted with an oral modification of the relationship between a land contract vendor and vendee.[93] The court relied on the earlier cases, but went far beyond them, stating that the vendees' interest, "was at best only a right to conveyance on payment of the balance of the purchase price. No title passed to them; therefore such interest could be surrendered by oral agreement . . . ."[94]

Looked at from the viewpoint of the protection and security sought by legislatures through statutes of frauds, the case may seem questionable.[95] In this intance, however, the blame cannot be laid

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88 *Id.*

89 The mortgage apparently was on the land itself, although the mortgagee did have knowledge of the prior rights of the original land contract vendee.

90 An analogous rule is applicable to mortgages: the interests of both the mortgagor and the mortgagee are interests in real estate for the purposes of the recording acts. Thauer v. Smith, 213 Wis. 91, 250 N.W. 842 (1933).

91 WIS. STAT. §§ 240.06-.08 (1967). Ch. 285, § 23, [1969] Wis. Laws —, *creating* WIS. STAT. §§ 706.01(1), 706.01(3), and 706.02 (6 WEST'S WIS. LEGIS. SERVICE 1371-73 [1970]), will limit the applicability of realty statutes of frauds to the same degree that recording statutes are applicable.

92 Maxon v. Gates, 112 Wis. 196, 88 N.W. 54 (1901); Tellford v. Frost, 76 Wis. 172, 44 N.W. 835 (1890).

93 Wilcox v. Scallon, 144 Wis. 74, 127 N.W. 1007 (1910).

94 *Id.* at 78, 127 N.W. 1008.

95 Under the permitted oral modification, the vendee relinquished his

on indiscriminate use of the doctrine of equitable conversion, for the holding and opinion of the court cut strongly against the dictates of the doctrine that a vendee's interest is real property. In this area, as well as in recording cases, the court has shown itself to be quite willing to ignore the doctrine completely. This seems fortunate, for the problems and issues in both areas demand solution on their merits, not through recourse to a doctrine imported without question from another distant area of the law. The only unfortunate aspect of these cases is that the court, in reaching its conclusions, used language which appears to repudiate the doctrine of equitable conversion altogether, rather than merely to limit its application to other areas. This results in confusion over the significance of the doctrine in such other areas as well.

F. Joint Tenancy

The Wisconsin court has long wrestled with common law and statutory rules and presumptions prescribing whether co-tenancies should be in the form of tenancies in common or joint tenancies.[96] From this a distinction has seemed to evolve between the treatment accorded real property and that accorded personalty, so that the tenancy of co-owners might be joint if the property were realty, but not if the property were personalty. It may be doubted that such a distinction has merit, but it does mean that where co-ownership and land contracts are blended in a single case, the doctrine of equitable conversion has potential significance.

In at least one instance, the court has applied the doctrine to help determine whether a vendor's interest in a land contract was jointly owned.[97] The court stated: "We start with the premise that a vendor's interest in a land contract is personalty and not real estate under the doctrine of equitable conversion."[98] Building in part on this premise, the court found that where the wife of a vendor joined him in signing a land contract, they did not thereby become joint owners of the vendor's interest; therefore, the wife held no interest at all in the contract upon the death of her husband.

The connection of the doctrine of equitable conversion to this problem seems remote, and recitation of the doctrine did not help the court to address the difficult problems presented in the case. However, the significance of this use of the doctrine has been eliminated by the passage of new legislation.[99] It seems unlikely that

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equity of redemption, a right which the court has traditionally jealously guarded. *See* Lynch v. Ryan, 132 Wis. 271, 111 N.W. 707 (1907); Hill v. Sidie, 116 Wis. 602, 93 N.W. 446 (1903); Schierl v. Newburg, 102 Wis. 552, 78 N.W. 761 (1899).

96 *See* WIS. STAT. §§ 230.43-.45 (1967).

97 Estate of Fischer, 22 Wis. 2d 637, 126 N.W.2d 596 (1964).

98 *Id.* at 642, 126 N.W.2d at 599.

99 *See* new WIS. STAT. § 700.01(6), *created by* ch. 334, § 15, [1969] Wis.

the court will be called upon in the future to apply the doctrine to questions arising under the statutes concerning the creation of joint interests under a land contract.

However, the court has applied the doctrine in a completely different way to maintain joint ownership. It has used the doctrine in a case to preclude a severance of joint ownership due to the conversion of real property into personalty, where the conversion was not intentional.[100] This case involved a building which was jointly owned by two persons and which was insured by them. The building burned. This normally would convert the property from realty to personalty, to the proceeds due from the insurance company, and this in turn might conceivably operate to sever the joint ownership. However, one of the owners died immediately after the fire, and the court was asked to rule whether there had been such a severance. The court noted that the intention of the parties seemed to be clear that the survivor should have the benefit of all the property or the proceeds from it, and then employed the doctrine of equitable conversion to reach a result consistent with this intention: "In equity a joint tenancy should not be severed in part by an involuntary conversion of such property into personalty by accidental means. The fact it is by the application of legal principles requires the application of the doctrine of equitable conversion."[101]

This use of the doctrine is consistent with its original purpose: to carry out the presumed intention of the parties involved. But, unlike traditional use of the doctrine, it goes further than merely establishing a presumed intention in the absence of directions from the parties. It honors such presumed intention above what it finds to be too rigid an application of formerly announced rules of law respecting automatic severance of joint tenancy. Finally, in a case that does not involve a land contract it cites the doctrine to support, not a conversion of a realty interest into personalty upon the happening of an event, but the continuation of realty interest despite the happening of such event. The doctrine is thus cited not to convert but to deny conversion under then existing legal rules. This result throws doubt on the extent and meaning of these legal rules as, to be sure, does any relaxing of such rules in aid of equitable considerations. But use of the doctrine to reach this result does not in any way help minimize this doubt or force the court to deal directly and

Laws — (6 WEST'S WIS. LEGIS. SERVICE 1461 [1970]). Moreover, the specific problem raised in *Fischer* has been dealt with under the same act. *See* ch. 334, § 15, [1969] Wis. Laws —, *creating* §§ 700.19(4), 700.20(1) (6 WEST'S WIS. LEGIS. SERVICE 1466-67 [1970]). The court stated in *Fischer* that the reason for the wife's signature on the land contract was to bar dower; however, since new legislation has also abrogated any inchoate right to dower (*see* note 58, *supra*), the value of precedent in this area is weak indeed.

100 Rock County S. & T. Co. v. London Assur. Co., 17 Wis. 2d 618, 117 N.W.2d 676 (1962).

101 *Id.* at 623, 117 N.W.2d at 678.

openly with the deficiencies of the rules it is changing.[102] Nor does it add clarity or understanding to the doctrine itself, for it is an example of nonconversion on equitable grounds, not of equitable conversion.

G. *Equity of Redemption*

After centuries of litigation, it is now firmly established that under certain circumstances a debtor who has secured his debt obligation with his land must be granted a period of time in which to cure a default on the debt before the land can be taken from him.[103] This period, which originally was granted by the Chancery Court, and which could be cut off or foreclosed in a Chancery proceeding, is commonly called the equity of redemption and represents a vendee's (or mortgagor's) equitable interest in the realty involved.

Wisconsin has long recognized and carefully protected the rights of both vendee and mortgagor to an equity of redemption.[104] The court has carefully outlined the limits of this equity, pointing out that its existence and degree of force depend on such considerations as the amount of the debt obligation which has been paid,[105] the magnitude and duration of default,[106] and the chances for raising enough funds to cure the default during a redemption period.[107] None of these factors is concerned with the classification of a vendee's or vendor's interest as realty or personalty, and, therefore, treatment of an equity of redemption seems unrelated to the doctrine of equitable conversion.

For this reason, most cases dealing with an equity of redemption do not contain any mention of the doctrine. But in two recent cases the Wisconsin court has indicated that it does find a connection between the two concepts. In one, the court made only passing reference to equitable conversion in an opinion concerned primarily with issues of debt acceleration.[108] But in the other, *Anderson v. Nelson*,[109] the court placed more stress on the doctrine, apparently holding that if equitable conversion has occurred, the vendee must then be conceded to have an equity of redemption. The court argued that under the facts of the case, which showed that the agreement be-

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102 Changes which are in part codified under ch. 334, § 15, [1969] Wis. Laws —, *creating* WIS. STAT. § 700.19(4)(a) (6 WEST'S WIS. LEGIS. SERV. 1466 [1970]).

103 *See* R. TURNER, THE EQUITY OF REDEMPTION (1931).

104 *See, e.g.*, the authorities cited note 95, *supra*.

105 *See* Neumann v. Gorak, 243 Wis. 503, 11 N.W.2d 155 (1943); Oconto Co. v. Bacon, 181 Wis. 538, 195 N.W. 412 (1923).

106 *See* Wenzel v. Roberts, 236 Wis. 315, 294 N.W. 871 (1940).

107 *See* Benkert v. Greunewald, 223 Wis. 44, 269 N.W. 672 (1936).

108 *See* Kallenbach v. Lake Publications, Inc., 30 Wis. 2d 647, 142 N.W. 2d 212 (1966), in which the court, in a parenthetical aside, states: "(if reason is an element of the mythological work of the doctrine of equitable conversion). . . ." *Id.* at 653, 142 N.W.2d at 215.

109 38 Wis. 2d 509, 157 N.W.2d 655 (1968).

tween the parties was more akin to an accepted offer to purchase than an ordinary long-term land contract, an equity of redemption would be inappropriate. On that basis, the court suggested that equitable conversion could not have taken place—even though the parties had both signed an agreement for the sale of real estate, pursuant to which the vendee had taken possession and had paid, in kind, more than $18,000 down.

Anderson v. Nelson is an instance where the court was asked to use the doctrine of equitable conversion under circumstances where it had no necessary or logical application; it is, for instance, certainly conceivable that a vendor's interest in a land contract should be considered personalty, whether or not the vendee has paid enough to be entitled to a substantial equity of redemption in the event of his default. Rather than refusing to apply the doctrine because it was irrelevant to the issues presented, the court first suggested that the doctrine was to be strictly construed and then defined the time at which it could become operative: not until after a long-term land contract had been executed. This definition is not consistent with the description of equitable conversion usually given by the court,[110] and it puts in doubt the operation of the doctrine in its more traditional areas of application. Reference to equitable conversion in this case did little to help the court settle the issues presented and threw more uncertainty over the limits and meaning of the doctrine itself.

IV. CONCLUSION

The doctrine of equitable conversion has received considerable attention in Wisconsin. In the area of its modest traditional application, succession of land contract interests on the death of a party to the contract, it has been greatly limited by the court in testate cases, and its utility has been abrogated by statute in intestate cases. It has often been urged upon the court in other legal contexts, and the consequence of judicial acceptance of this urging has almost always been that the meaning of the doctrine has become more and more complicated, while the substantive issues and policies presented for consideration were either ignored or lightly passed over. Thus, for example, the doctrine has been used to settle such issues as the intended meaning of judgment lien or tax statutes, to the exclusion of further analysis of the statutes themselves. And the details of its permissible application have been alternately defined from case to case—for instance, the prescribed time for commencement of

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[110] *Compare* Mueller v. Novelty Dye Works, 273 Wis. 501, 78 N.W.2d 881 (1956):

> 'In truth, the vendee becomes equitable owner of the land, the vendor equitable owner of purchase-money, at once, upon the execution and delivery of the contract, even before any portion of the price is paid.' 1 Pomeroy, Eq. Jur. (4th ed.), p. 686 sec. 368, footnote 1.

Id. at 504-05, 78 N.W.2d 883. *See also* 55 AM. JUR. *Vendor and Purchaser* § 355 (1946).

operation of the doctrine has been variously set at the initial execution of any contract for the sale of land; at the execution of a final, long-term land contract; at the assumption of possession by the vendee; or at the completion of all payments by the vendee.

The values of a legal doctrine like equitable conversion are that it can embody in simple form the collected wisdom of many cases in the application of legal policy to similar factual circumstances and that it can serve to clarify and unify legal rules where those same policies operate in more than one area. Equitable conversion, however, has not been confined to application under a single set of related policies. It has been used under widely differing circumstances, with the result that it is often difficult for courts to determine what, if any, policy results are furthered by the doctrine. Moreover, as the doctrine has been cited in some cases, while being denied or ignored in other cases and continuously redefined in still other cases, all without explanation, it has largely lost its original force as a simplifying concept of law. In Wisconsin, the doctrine seems to have served more to confuse than to clarify the law.

In a number of recent instances, the Wisconsin court has recognized that equitable conversion is only an artificial doctrine and has called for strict construction of it. Recent legislation has vitiated the need for the doctrine in several of the areas of its former application. It is to be hoped that this will give impetus to much more careful, more restrictive use of the doctrine in the future. Review of the history of equitable conversion in Wisconsin indicates that perhaps the law would be simpler and clearer, as well as more responsive to the individual issues and policies raised in each case, if reference to the doctrine were eliminated altogether.